OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOSEPH WILLIAMS, Petitioner V. UNITED STATES

CASE NO: 90-6297

PLACE: Washington, D.C.

DATE: November 6, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH WILLIAMS, :

Petitioner :

v. : No. 90-6297

UNITED STATES :

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Washington, D.C.

Wednesday, November 6, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:57 p.m.

APPEARANCES:

KENNETH H. HANSON, ESQ., Chicago, Illinois; on behalf of the Petitioner.

AMY L. WAX, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(1:57 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 90-6297, Joseph Williams against the United States. Spectators are admonished not to talk until you leave the courtroom. The Court remains in session.

Mr. Hanson.

ORAL ARGUMENT OF KENNETH H. HANSON

ON BEHALF OF THE PETITIONER

MR. HANSON: Mr. Chief Justice, and may it please the Court:

This Court granted a writ of certiorari to the Seventh Circuit Court of Appeals to review in a sentencing guideline case the sentencing of Joseph N. Williams. Mr. Williams was indicated, tried, and convicted and sentenced in 1989 in the District Court for the Western District of Wisconsin for violating 18 U.S.C. section 922(g)(1), possession of a firearm having been previously convicted of a felony.

The issue before this Court is whether or not in a sentencing guideline case a sentence must be remanded for resentencing if both improper and proper factors were relied upon by the district court in sentencing, or whether such a sentence may be upheld if there are proper factors standing alone that would justify the imposition

of the sentence.

Williams was sentenced in the district court both on improper and proper factors, the 27 months in prison to be followed by a 3-year period of supervised released. The improper factor that was considered by the district court in this sentencing were arrests that had not resulted in convictions. There was no litigation, there was nothing determining that these factors were indicative of more serious criminal activity. The United States Court of Appeals affirmed the sentence with these improper factors, notwithstanding it stated in its opinion a specific holding that there was error on the part of the district court in considering such sentencing an arrest. Notwithstanding that they affirmed the sentence.

It should be noted that arrest records in and of themselves which have not resulted in convictions are prohibited by section 4A1.3 of the guidelines, Sentencing Guidelines. The Seventh Circuit stated in its opinion that these arrests not resulting in convictions, whether or not litigated, should not have been considered in the defendant's criminal history points if they were not based upon accurate and reliable evidence of a more significant criminal history.

The district court in its preliminary calculations, this is the preliminary, sir, calculation of

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the correct applicable sentencing guideline considered the recommendations of the probation office which placed the offense level at 9, criminal history points at 10, and a criminal history category of Roman numeral V, with a resulting sentencing range of 18 to 24 months.

The district, however, in its final determination of the applicable sentencing guidelines, that's his final determination, what he actually considered it to be, the correct applicable sentencing guideline, decided that the criminal history category was not adequately considered by the probation office and he assessed 3 additional criminal history points, raising the criminal history points to 13 and the criminal history category to 6, with an offense level of 9 and a sentencing range of 21 to 27 months, which was greater.

He had previously stated that he was going to assess the sentencing against this defendant based at the highest level, so this raised him up from 24 to 27 months by the inclusion of these 3 additional points. But in so doing, in determining the final applicable guideline, the district court misapplied the guidelines by improperly considering, incorrectly applied the sentencing guidelines by improperly considering in sentencing the numerous arrests which had not resulted in convictions and which defendant had never been prosecuted.

Here's what the district court said when he did this, this was raising up his 3 points from 10 to 13. The serious criminal conduct reflected in those arrests, the serious criminal conduct reflected in those arrests, coupled with convictions more than 15 years old, both of which are barred by the sentencing guideline, suggested to the court that the defendant's criminal history was significantly more serious than that of most defendants in category V, and the court added 3 criminal history points to the previous criminal history point calculation of 10, resulting in 13 criminal history points, and placed the defendant in category VI with a sentencing range of 24 to 27 months, and by so doing he misapplied the guidelines.

4A1.3 does not permit prior arrest records in and of themselves to be considered in sentencing, and the sentencing guidelines in 4A1.1 section A also state that convictions over 15 years old are not to be considered in sentencing.

QUESTION: Do you think there is any indication in this record that the trial judge would have given a lower sentence if he had not considered the arrest record?

MR. HANSON: Well, in his preliminary calculation he said I am setting the criminal history points at 10. Then he says however, because of these arrests and other criminal activity which were not

resulting, they are over 15 years old, the other point that he made in doing this, the convictions were over 15 years old, he says because of those they show a more serious criminal history because --

QUESTION: And the trial judge --

MR. HANSON: Pardon me.

QUESTION: The trial judge also said that the court, too, is well aware of the fact that a prior arrest record itself shall not be considered.

MR. HANSON: Okay. But then he goes and he says the 4A1.3, I can consider that. He steps over that by saying there is permission in certain areas of the sentencing guidelines to consider that type of thing. But the sentencing guidelines in permitting that specifically states this does not apply to arrest records in and of themselves. That's what he's relying on here because there had been no convictions on those arrests.

QUESTION: Well, when the Seventh Circuit reviewed this it determined, I guess, that it thought the sentence was reasonable. Right? That the sentence given was reasonable even though there was a misapplication of the guidelines with regard to the prior arrest record.

MR. HANSON: No, I don't think so. Because if there is a misapplication of the guidelines the reasonableness issue is not a part of it. All you have to

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show in a misapplication that there was a misapplication, then the congressional will stated in that section of the code, 18 U.S.C. 3742(1), if there is a misapplication you shall remand. Clear and precise, shall remand.

QUESTION: Well, I thought, I thought the Seventh Circuit did not remand, that it found it was reasonable --

MR. HANSON: They did.

QUESTION: -- and it didn't remand. Isn't that right?

MR. HANSON: That's correct. They did. That's correct.

QUESTION: All right. So I'm trying to find out what the theory of that court was.

MR. HANSON: Well, the theory of it is they say, and I'll again answer that they have a rule, the Seventh Circuit clearly stated its rule in this regard and in its opinion. It stated it was error, this is out of their opinion, it was error for the district court to consider the prior arrests of defendant, it was error to do that, that had not resulted in convictions. Nevertheless vacation of the sentence is not necessarily required.

This is what they say, this circuit, the Seventh Circuit has adopted the rule that the sentence may be upheld if there are proper factors that standing alone

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would justify the departure. In other words if there are other factors that they could say in their mind was sufficient to justify this sentence regardless of the improper factors being there, they would affirm the sentence. That's their position.

QUESTION: Well, would the Seventh Circuit affirm if it were satisfied that the district court would have imposed a lower sentence absent those factors, or just if it --

MR. HANSON: I don't think they really considered that.

QUESTION: -- or if it's satisfied that the district court would have imposed the same sentence anyway?

MR. HANSON: I think what they're really saying, and I'm not trying to avoid your question, is that they would affirm it regardless of what the improper factor was or whether it determined in a higher sentence or a lower sentence if there were proper factors in their opinion that would justify this type of sentence. They are disregarding the improper factors, but they cannot do that. If there are improper factors considered, the other opinion which is based in three or four other circuits say that there is no way to control as to which amount the improper factors had in the final decision. They don't

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know.

QUESTION: Is there any need for remand if it is clear from the record that the same sentence would have been imposed?

MR. HANSON: Yes, there is need for it.

QUESTION: Why?

MR. HANSON: Because you don't really know that. And the --

QUESTION: Well, my assumption was if it's clear from the record that the same sentence would have been imposed, what's the need for a remand?

MR. HANSON: Well, I don't think it is that clear because you are saying then it is possible for a reviewing court to determine accurately, consistently right, what is the correct sentence here, and they have determined that below.

QUESTION: Well, we always do that with harmless error analysis, don't we?

MR. HANSON: Well --

QUESTION: Or appellate courts do.

MR. HANSON: There is this doctrine of harmless error, but I don't think in the guideline situation that you can do that.

QUESTION: Well, what if you had a situation in which the court said I am considering all of these arrests

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but in fact my sentence would be exactly the same even if I didn't consider the arrests? In other words I am kind of throwing in, that's just what I'm doing, but I'm -- that is not dispositive and in fact I would have come to the same conclusion without it. You would have a perfect harmless error situation there, wouldn't you?

MR. HANSON: I would refer you to a very good case on that point --

QUESTION: Well, before you refer me to the case, though, do you think that harmless error analysis would be appropriate in that instance?

MR. HANSON: No, I do not, sir.

QUESTION: Why not?

MR. HANSON: I'll tell you why.

QUESTION: Okay.

MR. HANSON: In United States v. Stephenson, 887 F.2d 57, at pages 61 to 62, it's a Fifth Circuit case 1989, a guidelines case, the court of appeals in that case found a similar incorrect application of the sentencing guidelines. The improper factor there was the considering of convictions more than 15 years old, not arrests not resulting in convictions, but both of these factors were considered improper by the sentencing guidelines. And they go on, the Fifth Circuit, the Government invites us to consider the erroneous weighing of the prior

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incarceration as harmless error as the district court indicated he would probably have imposed a sentence of 151 months even if he could have adjudged less.

Okay, here we go. We may not do so, however, in the light of 18 U.S.C. 3742(f)(1) which directs, if the court of appeals determined that the sentencing, that the sentence was imposed of a violation of law or imposed as a result of the incorrect application of the guidelines, the court shall remand for further sentencing proceedings with such instructions as the court considers appropriate.

QUESTION: But isn't -- you go ahead.

QUESTION: I was just going to say why didn't you just cite us to the statute instead of to the opinion? I mean, it is what the statute says, that if it was imposed in violation of law or imposed as a result of an incorrect application of the guidelines, it must remand for further sentencing. Suppose -- well, that is what it says. But it also says it has to have been imposed as a result. Now whose, whose burden is it to show that the sentence was imposed as a result of an incorrect application? It's yours on appeals, isn't it?

MR. HANSON: They've done that in this case. They've done that in this case. He raised up three points because of that consideration of the improper factors.

QUESTION: Well, there were three factors that

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the court mentioned, but you can't show that without the one incorrect one it wouldn't have been the same sentence. You don't, we just don't know. And if the burden is on you to show that the sentence was a result of that, it, you just haven't made out your case. So you get out of (f)(1) and you're down to (f)(2), because you'd say it's outside the, without that factor maybe it's outside the applicable guideline range and is unreasonable. And I gather that's what the court did here, so it just decided whether it was unreasonable or not. But how do you know it was a result of the improper factor? Do we know that here?

MR. HANSON: Well, I think we do.

QUESTION: Why? It mentioned that factor and a number of others. It might have been the same without that factor, and if the burden is on you to show it was as a result of an incorrect application then --

MR. HANSON: There is --

QUESTION: But the factors, the factors the court of appeals relied on were not among the factors that the district court referred to.

QUESTION: You've got two questions, Mr. Hanson. Why don't you answer Justice Scalia's first and then answer Justice Blackmun's.

QUESTION: I'm sorry.

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MR. HANSON: I'm going to point out to you, there is a statement in the district court's opinion, this is why I think we can determine whether it was raised, whether criminal history points were raised from 10 to 13 because of something that he considered to be in the case, the district court stated in the sentencing opinion, page 69 of the Joint Appendix is where you can find it, that the serious criminal conduct in those arrests, that's the arrests not resulting in convictions, that's what he's referring to, coupled with convictions more than 15 years old, that's what he's basing his upward departure on, suggest to the court that the defendant's criminal history was significantly more serious than that of most defendants in category V, and the court accordingly added three criminal history points to the previous criminal history point calculation of 10, resulting in 13 criminal history points. He is raising it up because of those two facts. That's what he's saying.

QUESTION: The court says elsewhere, the record is replete with convictions, and even if we count to but 5 felony convictions the court has the belief that the 10 points assessed is insufficient for the 5 felonies, 2 of which are outside the 15-year parameters.

MR. HANSON: But he does say that that -- he said that, I don't deny that. But he said also just what

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I have said, that he is relying on those two factors for the upward departure. There are other, this man has a criminal history, there is no question about that, but he is making the upward departure. The previous calculation had been at 10. He said I'm going to 13, and he tells you why he's going to 13, because he is considering these arrests not resulting in convictions and because of the other factor which he has stated was convictions more than 15 years old. And he is doing it for that reason.

I don't think that you can assume that because there --

QUESTION: You agree it would be a different case if he had mentioned one erroneous factor along with two valid factors?

MR. HANSON: No, no, I don't. No, I don't. Not at all. No.

QUESTION: That's still the same case? I mean, that's not your case. Let's assume --

MR. HANSON: Well, I don't -- I thought you phrased it in a hypothetical that if there were that situation, just one improper factor and two or three good factors, then he would have authority in his own way of doing things justifying what he did. I don't think that's true. I think -- here's what really I think you've got here, Judge. You've got a defendant up there and he is

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going to be sentenced.

Now, a sentencing hearing is not a big thing. You can do a sentencing hearing in one afternoon in a couple of hours if you have to. Why not sentence the man on the proper factors alone? When he walks out of that courtroom he knows he has been sentenced on things which he actually did, has been proven against him. These other things which are not properly proven against him are being considered against him. The Seventh Circuit held that was an improper thing to do. They admit that. Why go through all that? Send it back -- the appellate court is not to consider the sentencing anyway. The sentencing is to be done by the district court. And give the man his sentence. He is going to be sentenced, there is no question about it. He is going to be found guilty and sentenced for what he did. Do it on the proper factors.

When I sent Williams the copy of the opinion, the Seventh Circuit, he called me and he said well, the Seventh Circuit said it was in error for me to be considered on that point for sentencing. Isn't that right? And I said yes, that is right. He said well, is that fair? Why not sentence the man on the correct factors? It's easy to do. Why bring in this other factor and you create this terrific doubt. There is, several other circuits would say if that improper factor is

considered that's the wrong way to go at this thing. Do it on the proper factors. If it's not done on the complete proper factors, send it back. Do it right. Then he knows where he's at. Then everybody knows what the, what the sentence is done on the basis of it, only on the correct factors. There is no reason for keeping an improper factor in the sentencing. Do it on the correct factors.

And the objectives of the sentencing guidelines which you're creating here is that you want honesty in sentencing, you want proportionality, and you want uniformity. Those are the three factors that the guidelines are, were put into effect for. Convicting the man and sentencing him on improper as well as proper factors doesn't improve that position that the guidelines was requiring to be put into effect, the honesty of the sentencing.

There are several circuits which hold that you have to remand if you do consider improper factors. The Ninth and the Tenth and the Fifth Circuit clearly hold that in such a situation that should not be considered. I am going to give you a few of those.

QUESTION: Are they cited in your brief, Mr. Hanson?

MR. HANSON: Yes, they are. Yeah, they are.

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QUESTION: We can perhaps rely on that.

MR. HANSON: Well, just this one, United States v. Hernandez-Vasquez, it's a Ninth Circuit case, 884 F.2d 1314. The guidelines anticipate that departure will be rare. If the court relies, this is the Ninth Circuit, if the court relies on both proper and improper factors the sentence must be vacated and the case remanded. Because the district court considered improper factors we must vacate the sentence and remand for resentencing.

Moreover, this is another case in the Ninth Circuit, because the court statement of reasons contained an improper as well as a proper basis for departure we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors. Where the district court fails to determine the accuracy of the challenged information in the presentence report or to state that it is not relying on such information, the judgment must be reversed and the case remanded for resentencing.

The Tenth Circuit held in the United States v. Zamarripa, 905 F.2d 337, at page 342, it's a 1989 case in the Tenth Circuit, where one -- here's where you go, here's on the one question, where one of two or more stated reasons for the departure is invalid the case must be remanded for resentencing because the reviewing court

cannot determine whether the same departure would have resulted absent the improper factor. Consequently you vacate the sentence.

Those, plus Stephenson -- now, there's one more case I want to give you before I close on this thing, and it's the only case decided by this Court on the sentencing guideline outside of this one, United States v. Misstreata, 109 Supreme Court 647 at 652, this Court stated the following. The Sentence Reform Act of 1984 makes the Sentencing Commission guidelines binding on the courts although it preserves for the judge the discretion to depart from the guidelines applicable to a particular case if the judge finds an aggravating or mitigating factor is present that the Commission did not adequately consider for formulating, when formulating the guidelines.

In other words they are saying that which has been determined by the guidelines is binding on this Court, but it is only in an aggravating and mitigating circumstance in regard to a factor that the Sentencing Commission did not consider in creating the guidelines that permits this departure. In other words the departure has to be based on something outside of a factor that was considered and determined in the guidelines, which has been done here. Arrests not resulting in convictions have been strictly considered and decided by the sentencing

guidelines, and convictions more than 15 years old, the same thing. That's been considered and is part of the guidelines.

The only way, according to Misstreata, that you can make that departure is if those factors that they are relying on were not considered by the guidelines, and that's 2, that's 2, that's 3742(f)(2). If they have been considered they can't make the departure on that case. That's a good opinion, and it's the opinion of this entire Court, not entire, there was one dissent, but it's a solid opinion. They have not followed that in this case. These factors were determined and considered by the sentencing guidelines. Misstreata is the final word, I would say, in this particular situation.

I'll save any time that I have for reply, sir.

QUESTION: Very well, Mr. Hanson.

Ms. Wax, we'll hear from you.

ORAL ARGUMENT OF AMY L. WAX

ON BEHALF OF THE RESPONDENT

MS. WAX: Mr. Chief Justice, and may it please the Court:

Perhaps it's best to begin with the language of the statute. In subsection (e) of section 3742 of title 18 we are told that in reviewing a sentence including, in this specific case, a sentence that departs from the

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guideline, an appellate court must determine whether that sentence was imposed as a result of an incorrect application of the guidelines or, in the case of departures, whether the sentence is unreasonable. In other words, the Court must ask a number of questions. Was there a departure from the guidelines? Did the district court make an error in applying the guidelines in the course of its departure decision? Can it be determined that the misapplication of the guidelines was responsible for the departure, that is was an impermissible consideration the but for cause of the sentencing decision? And finally, was the resulting sentence unreasonable?

Under subsection (f) if the Court determines that the sentence that was imposed is a result of a misapplication of the guidelines it must remand the sentence. If the Court cannot make that affirmative determination on the basis of the record then it has to go on to consider whether the sentence, the departure, the decision to depart, and the degree of departure is reasonable, having regard for the remaining valid reasons given by the court, but also the record as a whole.

Now, in the case of departures from the guidelines, this system makes a lot of sense. A court is authorized to depart from the guidelines when there are

circumstancing, circumstances surrounding the crime that indicate that the severity of the criminal conduct is not reflected in the guidelines. Under the statute sentencing courts are required to give reasons for departing from the guidelines, and very often district judges cite more than one reason for departing from the guidelines. Also on many occasions it is not uncommon for judges to make mistakes in explaining their reasons for a departure. Some of the factors they cite may be valid grounds for departure and others may not be valid.

It is also not uncommon, however, for departure decisions to be what we might call overdetermined decisions. That is very often a judge has more than enough reason to decide to depart from the guidelines, so that not all of the reasons that are mentioned are actually essential to the decision to depart. Now, given this situation it means in practice that not every mistake that a judge or a court makes in deciding to depart from the guidelines will actually issue in a sentence that needs to be corrected. If Congress had a rule, in effect an automatic reversal rule whereby every error that a judge makes in the course of applying the guidelines and making a decision to depart requires an automatic remand, in practice that would result in a lot of useless remands.

QUESTION: Ms. Wax, what if the sentencing judge

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says the reason I am departing from the guidelines to a higher level is a, b, and c, and both a, b, and c, or all three of them are bad?

MS. WAX: If all three of them are bad that means that satisfies (e)(2). Then the judge did make a decision to depart as a result of a --

QUESTION: As a result.

MS. WAX: Yes.

QUESTION: That would satisfy it.

MS. WAX: And so we wouldn't go on to evaluate reasonableness in that case.

QUESTION: But the other side says that that's what occurred here. You disagree with that?

MS. WAX: We disagree with that, Your Honor, and we think that the record bears us out. We cite several passages which certainly would support a court's determining that it's more likely than not that the court would have given the same sentence, and that's all that the court is really required to determine to go on to the reasonableness evaluation.

QUESTION: Well, now, wait. There's a difference between it occurred as a result of or not. I mean, I can say it occurred as a result of this mistake, but the court would have done the same thing even without the mistake. Aren't they two separate questions? I don't

want to, you know -- it can be a result of it even though you would have reached the same result by some other means, but in fact it was a result of this mistake. And that's what the statute says. If it was a result of it. Now maybe he would have gotten the same place anyway, but if so he'll do it on remand. It seems to me what the statute says, if it was a result, even if it's conceivable that for some other reason he might get there anyway --

MS. WAX: Well, we read as a result of language to mean in effect a but for cause in the sense that the judge would not have given the same decision, would not have given the same sentence if it had not, if the judge had not considered that factor. There is a way of seeing -- a judge can consider a reason. If you asked the judge when he made the decision what are you considering, he might give all three reasons. But that doesn't mean, as this Court said in Price Waterhouse, they said exactly this. If you ask the decision maker, he would give all the reasons, but that doesn't mean that the one reason you isolate is a but for cause of the -- it's a result of that reason.

QUESTION: That's why I asked you my first question, Ms. Wax, and what you're saying now is inconsistent with your answer to that. If you believe what you're now saying, then it seems to me you ought to

say even though the judge says I am giving you the additional three points because of a, b, and c, and even though a, b, and c are all bad, you would still have to further inquire whether there wasn't some other material down there which would have led him to the same conclusion anyway. But your answer was categorical. If he gives all wrong reasons you say it goes back automatically. Now, which, which is right?

MS. WAX: Because the result of inquiry actually looks at what the decision maker who makes the decision would have done, not what some other decision maker over here could have done with the same record. Reasonableness looks at other factors that another decision maker might have been able to look at, but we can't get to that point until we make a determination about this judge and this court based on what they say, what they would have done. It's a hypothetical exercise. It's a thought experiment.

We understand that the analysis requires us to hypothesize about what this judge would have done if he had not had regard for the improper reasons, but that's the sort of thought experiment this Court engages in all the time. It does it under title VII, it does it in other cases where there are over determined decisions where many different reasons are given and we have to decide if the illegitimate reason, the invalid reason, is really the one

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that is responsible for the decision, and that the decision would be different without it. That's --

QUESTION: Let's assume we accept your argument there. Isn't it fair to say here that one of the values that we want to preserve is the value of kind of an active informed discretion on the part of the trial judges? And if that's what we want to do, if we want an assurance that the resulting sentence really is the result of a judge's expert and informed discretion, then why don't we, as it were, give the benefit of the doubt to the defendant in each case and on the hypothesis that you give send it back simply to preserve that value?

MS. WAX: Well, Your Honor, I don't think that's the only value that's at stake here, and it's also important to point out that that value was much more important before the Sentencing Reform Act than it is now, because now it's possible for appellate courts to in effect substantively review sentences. For the appellate courts to evaluate the objective legitimacy of sentences really apart from what --

QUESTION: Yeah, they've got a much narrower --

MS. WAX: -- the district court did --

QUESTION: They've got a much narrower range to do it, but discretion hasn't been eliminated entirely here.

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MS. WAX: Well, that's true. And the first part of the test looks to what the sentencing court actually did, at least in the sense that if there is a positive determination that the sentencing court would have done it differently we send it back. Now, if you can't make that positive determination -- in effect what Congress did here is they said well, if we can't make that positive determination we don't really care what was going through the mind of the district court. It may be possible that the district court would have done it differently if we sent it back, but possible isn't good enough. Now the appellate court is going to step in and it is going to, in this limited circumstance in effect step into the shoes of the sentencing court and make its own decision about whether the departure is reasonable, conceding that because it has already passed the results test there must be valid grounds and sufficient grounds out there that the sentencing court gave.

QUESTION: Ms. Wax, is (f)(1) sufficient in this case? Could you take me through the statute? Because you cite (f)(2) in your brief, and it seems to me that (f)(1) would be sufficient for the result that you want, but maybe I'm incorrect about that.

MS. WAX: Well, it wouldn't, because all (f)(1) tells you is, it tells you what happens if the court

actually determines that the sentence was a result of a misapplication of the guidelines.

QUESTION: It tells you that you should remand.

MS. WAX: Right. And implicitly here the court didn't make that determination, or else it would have remanded.

QUESTION: So then you must go to (2)?

MS. WAX: Yes. You must go to (2). And that shows why it's reasonable to have this, this harmful error standard, if that's what you want to call it, because that's not the end of the matter. When the court fails to make the determination that the lower court would have done it differently, it's not as if the uncertainty is resolved against the defendant and we rest with that.

QUESTION: But how does (2) help you when it's not -- I take it you don't think this is unreasonable?

MS. WAX: Correct. And --

QUESTION: So how is (2) applicable?

MS. WAX: Well, the -- (1) and (2) tell us what, how, what it is that the appellate court must do and the determinations that the appellate court must make, the actions that the appellate court must take when it finds certain things. (f)(1) tells us --

QUESTION: But what do you get out of (2)? Once you find it's unreasonable it's just not

relevant -- pardon me, once you find it's reasonable it's just not relevant.

MS. WAX: Well, if the court finds that it's unreasonable, even though it has passed the test of (1), the sentence must go back. So there is a second chance for a remand, so to speak. The court must remand if it finds that the departure is nevertheless unreasonable even though the court would have given it anyway. So, for example, suppose that the court decides that the factor, the invalid factor, here an arrest record that a district court relied on, didn't really affect the sentence, the court would have given the same, would have made the decision to depart anyway. And suppose that the court decides to depart by, oh, let's say 10 years instead of 3, instead of 3 months as it did here. Then the court has to decide whether a 10-year departure is reasonable. Now, on this record a 10-year departure probably wouldn't be reasonable, and in that case the sentence should go back. So the reasonableness inquiry is mainly focused on the degree of departure.

QUESTION: Well, I'll study it. It still seems to me that section (1) would be adequate, that section -- and you have, you have to go beyond, somewhat beyond the statutory language anyway in order to reach your result of harmless error. So I don't see how (2)

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helps.

QUESTION: May I get, may I ask you a question, Ms. Wax? I understand your argument, but are you sure it fits what the Seventh Circuit did in this case, because this case the Seventh Circuit did not make any determination under (1). Your opponent says they did, but even I don't think you would argue that they did determine it was not imposed as a result. What they did is go right to the reasonableness inquiry and decide that they thought it was reasonable. They did not make the decision that they thought the district court would have imposed the same sentence. Do you think their analysis was adequate?

MS. WAX: Well, they do not in so many words make a but for type of a determination. I mean, that's true.

QUESTION: All they talk about is reasonable.

MS. WAX: Well, I think their language can fairly be read to involve a determination that the court wouldn't have done things differently, and the language I am referring to is on page 82 of the Joint Appendix. It says --

QUESTION: On page what, Ms. Wax?

MS. WAX: 82 of the Joint Appendix, where the court --

QUESTION: Before you read that, keep in mind

the language at the bottom of 81, that the sentence may be upheld if there are proper factors that standing alone would justify the departure, which I take to mean in their opinion would justify the departure.

MS. WAX: Well, certainly the case that they cite, United States v. Franklin, the previous Seventh Circuit case, had taken a purely objective sort of appellate reweighing view of --

QUESTION: Right.

MS. WAX: -- this matter. There is no question about that. And in that sense they were just parroting what Franklin says. We're not recommending that standard here, that in fact the court can disregard all the errors and whether the errors caused the sentence, and they can just go ahead and decide whether it would, there was a correct result or not.

QUESTION: So you don't defend the rationale of the Seventh Circuit?

MS. WAX: Well --

QUESTION: What is the language used?

MS. WAX: There is language that I think can fairly be construed to have made the proper determination, and they say, the middle paragraph of 82, we conclude that despite the error noted the court correctly determined that Mr. Williams' criminality was not reflected properly

in the criminal history category, which goes to the decision to depart or not. So we read that as in effect saying setting aside the error noted the court made a correct determination to depart, or that's one possible way of reading it.

QUESTION: And they, up above they said, at the top of 82, they said therefore we shall examine the other factors that the district court considered in deciding to depart upward. So -- and they say that there were enough factors, that the court below made a correct decision even with the error.

MS. WAX: Well, that -- examining the other factors is both part of deciding whether the misapplication actually affected the decision and part of the reasonableness inquiry. It's part of the first inquiry --

QUESTION: And the court, the court heads that paragraph up as, harmless error.

MS. WAX: Well --

QUESTION: That section is entitled harmless error.

MS. WAX: True. We're not exactly recommending a harmless error standard, but we just chalk that up to a careless vocation.

QUESTION: Well, I know, but you say the court

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decided the same decision would have been handed down anyway. That's what you just said.

MS. WAX: Precisely. The same decision.

QUESTION: Well, that's -- isn't that harmless error?

MS. WAX: Well, one has to be careful here.

QUESTION: A brand of it?

MS. WAX: The statute says that there needs to be an affirmative determination that the decision would not have been different. That's different from harmless error. A harmless error determination would be something like the court must decide that, that the court would, would have made -- would not have made a different decision. It's a difference in how the uncertainty is resolved.

QUESTION: The statute doesn't say that, Ms. Wax. I mean, that's what you want it to say, that the decision wouldn't have been different. The statute says that the decision must not have been a result. Now, if the decision could be a result of the improper factors, even though were the same judge to decide it over again he might decide the same way, it would still have been a result of the improper factors if they were the only things he considered. And I want you to tell me why, where in this record there is any indication that all of

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the factors that he used for the three point departure were not, were not improper factors? What other factors did he use for the three-point departure that were not improper factors? The only things I see here are five felonies, two of which were beyond the 15-year period, and that's improper, isn't it?

MS. WAX: Well, no, he -- there were five felonies and then there were two beyond the 15-year period.

QUESTION: Two of the five. Two of the five. That's what it says in the record. That's what he says in the record anyway. He says the record is replete with convictions --

QUESTION: Where are you, where are you reading?

MS. WAX: Where are you reading?

QUESTION: It's at 53, Chief Justice. The record is replete with convictions, and even if we count to but five felony convictions the court has the belief that the 10 points assessed is insufficient for the five felonies, two of which are outside the 15-year parameters. Now, so he's using five felonies, which is an improper factor because there were really only three within, you know, that he should have been considering. And the other thing he is using are the arrests, which he shouldn't have been considering. So all the factors he said he is

relying on are bad factors.

But you want us to say well, that's right, it was cause -- it was a result of an improper, of an incorrect application of the sentencing guidelines, but we're going to ask ourselves would that judge, even though it was a result, if he had to make the same thing over again would he have come out the same way. I don't think that's a proper reading of the statute. Once you find it's a result, it's a result, period. That's the end of it.

MS. WAX: Well, Your Honor, let's just get one thing straight. In deciding to depart he is allowed to use the two convictions outside the 15-year range. That is a proper ground for a decision to depart. So that is a proper ground --

QUESTION: That is a proper factor. All right.

MS. WAX: Yes, it is. Yes. So --

QUESTION: Your colleague was saying that it is not.

MS. WAX: He is wrong. Under the guidelines, 4A1.3, it specifically says that a judge may use convictions that are not counted in the actual criminal history score in deciding to depart from the guidelines if those factors demonstrate to the judge that the criminal history score doesn't properly take into account the

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severity of the record.

QUESTION: And the court of appeals said that we cannot say the consideration of these two convictions as part of the overall assessment was inappropriate.

MS. WAX: Exactly. And that's, that's the valid ground that the court of appeals found was --

QUESTION: They just said the previous arrests without convictions were not proper.

MS. WAX: Right. And in fact the passage you're reading from on page 53 of the Joint Appendix if anything helps us. Because in effect there the court is saying that looking at these five felonies including the valid ground for departure alone we conclude that 10 points isn't enough. And then in the very next paragraph he mentions the prior arrest record and then, without missing a beat, says and we know that we can't rely on a prior arrest record under the guidelines. Under 4A1.3 it says, it spells out that this is not a valid ground for departure, and we think that this is a record on which we can say with confidence that the court would have done the same thing if it had never taken note of the arrest record.

QUESTION: What was the amount of the departure here, Ms. Wax, 3 months?

MS. WAX: Yes, Your Honor. The court of appeals

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quite reasonably concluded that it wouldn't take much --

QUESTION: That's 3 months in the upper reach, though, isn't it?

MS. WAX: Right. From an upper sentence of 24, or a ceiling sentence of 24 to a ceiling of 27, and the court decided to sentence at the top of the guidelines range.

Now, as we said, this is a very sensible system of appellate review. It's a pragmatic system because there are 44,000 sentences a year that are doled out under the Sentencing Reform Act, and Congress could logically have an interest in not remanding a lot of sentences that in fact were legitimate and valid and had a perfectly good justification under the guidelines and in the record.

QUESTION: Do you have any figures on how many of those are appealed?

MS. WAX: I'm sorry, we don't. We do know that there are almost three times as many downward departures as there are upward departures. And so the rules that were, the reading of 3742 that we're recommending, it's quite evenhanded between downward and upward departures in that it tends to minimize the number of mandatory remands. And of course when the Government is appealing downward departures we have an interest in maximizing the number of mandatory remands.

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QUESTION: Ms. Wax, here the factors that the court of appeals talked about were all factors that the judge himself relied upon --

MS. WAX: Right.

QUESTION: -- for the departure. Now what if the court of appeals says well, there are other factors in the record that the judge didn't say he was relying on, but we can do the judge's job as well as he can. We'll use these other factors and say that there was, with these factors which the judge didn't rely on there was ample basis for the departure. I take it you're not urging, saying that the court of appeals should be affirmed in that case?

MS. WAX: Well, yes and no. Congress could have designed a system like that, but it didn't.

QUESTION: Well, all right.

MS. WAX: It designed a sort of hybrid system. The first question is did the sentence result from an incorrect application of the guidelines, can we determine that it did? Once we answer no to that, then the court has to evaluate the reasonableness of the departure that was actually given, and when it does that there is nothing in the statute that prevents the court of appeals at that juncture from looking at the record as a whole, and maybe perhaps looking at some other things --

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QUESTION: Well, I know, but there's no doubt that if the court of appeals says that the, here are a, b, and c that the district court relied on, he shouldn't have, that there was error, the district judge committed error in relying on those particular factors. And without -- and the other factors that he relied on were not sufficient in the court of appeals' view, that he actually relied on. But they say there are other factors in the record that would convince us that the sentence was proper.

MS. WAX: Your Honor, on our reading of 3742 the court of appeals could not do that. It may well be tempting for them to do that. There have been some court of appeals that have done it.

QUESTION: All right. That's all I wanted to know. You're not, you're not -- we're not deciding that case when we, if we agree with you.

MS. WAX: Right. If the sentence is wholly the product of invalid factors, even if there were 18 other valid factors the court could have relied on, it has to go back. That's --

QUESTION: The court of appeals can't dream one up that the district court didn't rely on?

MS. WAX: Not for the decision to depart.

QUESTION: May I just be sure I have something

clearly in mind? Under -- however we come out on as a result of, whether you say that the defendant has to prove that it was the result of, or the Government has the burden of establishing that the same sentence would have been imposed anyway, it still is true that the first thing the court of appeals has to do is answer the as a result of inquiry.

MS. WAX: Right.

QUESTION: And until they do that they don't get to the reasonable test.

MS. WAX: Right.

QUESTION: And in this case they did not answer the as a result of -- at least one could read the opinion as not having answered that inquiry.

MS. WAX: We -- we --

QUESTION: You think they did, I understand. But if they did they really didn't have to talk about reasonableness.

MS. WAX: No. If they --

QUESTION: And they did talk about reasonableness.

MS. WAX: They have to talk about reasonableness. Okay. Once they decide that it is not definitely the case that the district court would have done something different --

QUESTION: It's not an (f)(1).

MS. WAX: Okay, then we're into the realm of well, they might have done something different, we're not really sure, and we're not sure the degree of departure was proper.

QUESTION: Oh, I see. So what you're saying is the defendant really has two chances of winning. One by --

MS. WAX: Exactly.

QUESTION: -- proving it was not a result of, or alternatively saying it's unreasonable.

MS. WAX: Right.

QUESTION: Okay. I understand.

MS. WAX: There are two groups of cases that can remand it at two separate stages of the inquiry. The ones where it's a result of the misapplication, and then the ones that are unreasonable. And all the other ones can be affirmed.

If the Court has no further questions.

QUESTION: Thank you, Ms. Wax.

Mr. Hanson, do you have rebuttal? You have 7 minutes remaining.

QUESTION: Mr. Hanson, as I gather from Ms. Wax you win the case if you show that the only factor --

QUESTION: Let him get to the lectern, will you?

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QUESTION: Okay. I'm just --

MR. HANSON: I agree. I'm going to win this case.

QUESTION: I'm just trying to save time, Chief Justice.

REBUTTAL ARGUMENT OF KENNETH H. HANSON

ON BEHALF OF THE PETITIONER

MR. HANSON: First of all, you've got a case on the record right now, Misstreata, it's the only case that went before this Court on the sentencing guidelines, and the language in that opinion says the Sentencing Reform Act of 1984 makes the Sentencing Commission guidelines binding on the courts although it preserves for the judge the discretion to depart from the guidelines applicable to a particular case if the judge finds an aggravating or mitigating factor is present that the Commission did not adequately consider when formulating the guidelines.

Both of these factors were considered by the guidelines. Arrests not resulting in convictions and convictions more than 15 years old. They have defined that those things are not ordinarily usable and properly usable in such a situation.

QUESTION: I take it then that you -- there is complete disagreement on what the law says between you and Ms. Wax?

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MR. HANSON: I am sure there is.

QUESTION: You say that convictions more than 15 years old cannot be the basis of a departure?

MR. HANSON: Here is what they say in the guidelines. 4A1.1(a). Certain prior sentences are not counted or are counted only under certain conditions. Here's what they say. A sentence imposed more than 15 years prior to the defendant's commencement of the incident offense is not counting unless the defendant's incarceration extended into the 15-year period. If the conviction was over 15 years old and the sentencing of that conviction did not extend into the 15-year period between that offense and this offense it is not to be considered. That's what they're saying.

QUESTION: Well, it's not to be considered for the regular, for the regular level. But can it be the basis of a departure from the regular level?

MR. HANSON: No. That's what they're talking about.

QUESTION: They're talking about departures?

MR. HANSON: They're talking about departures, sure. That's how you're going to get up there, is by including this. They say you're not supposed to do that. Both arrests over 15 -- what is Stephenson saying? He takes up that point specifically in Stephenson. He says

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he can't do that because the incarceration in that case was in the 15-year period, the convictions were past the 15-year level. He says he can't do it. Stephenson is a great case. Read it. Read it. On page 64 and 65. They go into that.

QUESTION: Do you think this particular question is within the scope of your, of the question you raised on certiorari here?

MR. HANSON: Well, the sentence -- the --

QUESTION: You just, you posed us the question of whether the sentence must be remanded and resentenced if both improper and proper factors are relied on.

MR. HANSON: Well, that's the basic overall thing, yeah.

QUESTION: Well, that's the question. I don't know that we have to decide which one of you are right in this case.

MR. HANSON: Well, I think if you read Stephenson, if you read Misstreata, there is no two ways that you're going to get this information in properly to determine an upward departure. Both of these factors that he relies on, that he sentenced this upward departure --

QUESTION: Were improper you think?

MR. HANSON: Pardon?

QUESTION: Both of them were improper?

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MR. HANSON: Sure they're both --

QUESTION: All of them were improper?

MR. HANSON: Well, not all, no. Not all. But the ones that she is using and that have been used by this court to make this upward departure aren't proper. And another thing, 3741 -- 3742(1) clearly states if it was a result of an incorrect application of the guidelines. Stephenson exactly says that this type of thing, convictions more than 15 years old, are an incorrect application of the guidelines. He says that right in this opinion. There is no doubt about it. That's what he decided. Now that's a circuit court decision there.

You get up to Misstreata, which is this Court's decision, they're saying the only way you can make that departure is if the guidelines had not considered these issues. They have considered these issues. You have got to go by what the guideline says here, and that's what they're getting at. Arrests not resulting in convictions, convictions more than 15 years are not to be considered. But now you're going to say --

QUESTION: Well, you know the court of appeals said that those, that those older than 15-year-old convictions could be considered, and you didn't challenge that in your petition for certiorari.

MR. HANSON: Wait a minute. Wait a minute. I

don't follow you there. Where did I say, where did I say that?

QUESTION: You didn't say it. The court of appeals held that it, that the district court properly relied on those old convictions. That's what they specifically held. You didn't challenge that.

MR. HANSON: You mean in our case here, not the --

QUESTION: Yes. Right now. Yes, indeed. That's what they said.

MR. HANSON: What did they say, so I understand what you're getting at here?

QUESTION: Well, I just wonder if you have challenged, if you have raised that question -- you didn't challenge that holding of the court of appeals.

MR. HANSON: That's the Seventh Circuit you're talking about?

QUESTION: Yes.

MR. HANSON: What was the, what was the conviction?

QUESTION: They said, they said we cannot say that consideration of these two convictions as part of an overall assessment of the defendant's criminal background was inappropriate.

MR. HANSON: Well, that's -- they use those

words, that's what they're saying. But they can be wrong on that.

QUESTION: You did, you did say, to be fair, in your question presented, when the Sentencing Commission has determined that arrests not resulting in convictions and convictions more than 15 years old should not be considered in determining the defendant's criminal history category. Should this Court permit a district judge to use such information in departing upward to a harsher sentence?

QUESTION: And you rephrase that in your brief. You rephrase that question in your brief.

MR. HANSON: Yes, sir. I so did, yes. That's my position in the whole case. I think the Misstreata decision of this Court is completely dispositive of the issue. They have to determine that these things were not considered by the guidelines in making this upward departure, and they haven't done that.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hanson.

The case is submitted.

(Whereupon, at 2:53 p.m., the case in the above-entitled matter was submitted.)

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BY alan friedman

(REPORTER)